In The

Supreme Court of the United States

October Term 1976

No. 75-1861

GORDON G. PATTERSON, JR.,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Appeal from the
New York Court of Appeals

BRIEF FOR THE [redacted] APPELLEE

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QUESTIONS PRESENTED

Whether New York's affirmative defense of extreme emotional disturbance, which permits a defendant against whom the crime of murder has been proved beyond a reasonable doubt to reduce murder to manslaughter by establishing by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance, comports with due process.

STATUTES INVOLVED

N.Y. Penal Law §125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; . . .

N.Y. Penal Law §125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . . .

N.Y. Penal Law §25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellant was convicted following a trial by jury of the crime of murder. The facts, as summarized in the court below, are as follows:

The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off

accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§125.25 [subd (1) (a)], 125.20 [subd (2)]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that "'extreme' precludes mere annoyance or

unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * *". The Court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder." No objection was taken to the above quoted portions of the court's charge.

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

* * *

In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down.

A (96-101)*

*Numerical references preceded by "A" are to the Appendix to Appellant's brief.

The New York Court of Appeals agreed to consider the issue of the constitutionality of the affirmative defense of extreme emotional disturbance even though the defendant had failed to object to the trial court's charge on this point, "[s]ince the error complained of goes to the essential validity of the proceedings conducted below . . . ." (A103). The Court also decided that *Mullaney* should be given retroactive effect enabling the defendant to assert this claim, although his conviction predates the *Mullaney* decision.

In a four-to-three decision, the Court of Appeals upheld the constitutionality of the statute, the majority concluding that "the New York law of homicide differs significantly from the Maine law struck down in Mullaney." (A103-104). In separate concurring opinions, Chief Judge Breitel pointed out "the salutary criminological purposes served by the development of affirmative defenses, . . ." and Associate Judge Jones concluded that since "[o]ur Legislature has carefully and thoughtfully revised our State's Penal Law" and "the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today," the statute should not be declared unconstitutional in the absence of more explicit authority than the *Mullaney* decision (A19, A22). The dissenters concluded that "[u]nder *Mullaney*, there is no alternative but to hold [the affirmative defense of extreme emotional disturbance statute] unconstitutional as a violation of the due process provision of the Fourteenth Amendment."

SUMMARY OF THE ARGUMENT

New York's affirmative defense to murder of extreme emotional disturbance does not violate due process as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 357 (1970). Unlike the statutes declared void in each of those cases, the New York statute in the instant case places the burden of proof on the prosecution to prove the elements of the crime charged beyond a reasonable doubt.

Although the New York statute appears similar to the Maine statute struck down in *Mullaney*, the fundamental and significant distinctions between the two statutes become readily apparent upon a reexamination of the basis of the *Mullaney* decision. The confusion and controversy engendered by that decision make it imperative that this Court seize the opportunity presented by the instant case to clearly articulate the scope of that decision.

Respondent urges this Court to declare that the decision in *Mullaney* applied only to the Maine statute and the unique defect contained therein and that affirmative defenses, in general, are not prohibited by the Constitution. Absent such a declaration, there will undoubtedly be endless litigation concerning the constitutionality of scores of affirmative defenses promulgated by many states such as New York, whose affirmative defenses are set forth in a table appended to respondent's brief.

The defect in the Maine statute that was the basis for this Court's holding that it violated due process was that the prosecution did not have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder. Under the Maine statute, the prosecution need only have proved the requisite intent for manslaughter to achieve a conviction for murder.

The defect in the Maine statute is not present in New York's homicide statute. In New York, the prosecution must prove all elements of the crime of the murder, including intent to cause death before the defendant is given the chance to reduce murder to manslaughter by proving by a preponderance of the evidence that he acted under an extreme emotional disturbance. The New York statute thereby satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged.

No significant difference regarding burden of proof exists between New York's affirmative defense of extreme emotional disturbance and the affirmative defense of insanity upheld by this Court in *Leland v. Oregon*, 343 U.S. 790 (1952), and *Rivera v. Delaware*, U.S. , 20 CrL 4030 (1976), and every state that has recently considered the question. The defense of extreme emotional disturbance places less of a burden upon a defendant than does the defense of insanity, since the former only mitigates the crime charged, requires less reliance on expert testimony and contains a sympathy-arousal aspect. The defense of insanity relates to the issue of the defendant's guilt or innocence, virtually requires the use of expert testimony, and is not conducive to sympathy arousal in the eyes of a jury. The New York statute in the instant case should, therefore, satisfy due process as readily, if not more so, than the statutes upheld in *Leland* and *Rivera*.

Finally, should this Court reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent urges that *Mullaney* not be given retroactive effect. The arguments against retroactivity are set forth in the respondent's brief in *Hankerson v. North Carolina* (No. 75-6568) where the retroactivity issue, unlike in the *Patterson* case, is squarely presented.

POINT I

New York's affirmative defense to murder of extreme emotional disturbance does not violate due process.

Appellant contends that this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 357 (1970) mandate a reversal of the New York Court of Appeals decision below upholding the constitutionality of New York's affirmative defense to murder of extreme emotional disturbance. Under New York's Penal Law, the burden is on the defendant to prove by a preponderance of the evidence that he was acting under the influence of extreme emotional disturbance in order to reduce murder to manslaughter. N.Y. Penal Law §§125.25, 125.20, 25.00. Appellant contends that the New York affirmative defense is "functionally identical" to the Maine statute declared unconstitutional by this Court in *Mullaney*, that the majority opinion below misread the *Mullaney* decision in upholding the New York affirmative defense, that affirming the Court of Appeals decision would result in the "erosion" of *Mullaney*, and that "shifting the burden of persuasion made a difference in this case."

It is respectfully submitted that appellant errs in his analysis of the *Winship* and *Mullaney* decisions and that a reversal of the decision below is not constitutionally mandated. Specifically, it is respondent's position that the constitutional defect in the Maine statute is not present in the New York statute. In New York, the burden of proof in a murder prosecution is at all times on the People to prove the elements of the crime of *murder* beyond a reasonable doubt, whereas in Maine the People did not have to prove all the elements of the crime of *murder* beyond a reasonable doubt. The defect was, in essence, the *absence* of a constitutionally mandated burden on the People to prove the crime of murder and not the *presence* of a burden upon the defendant to prove a mitigating factor which would reduce his culpability. The confusion generated by the *Mullaney* decision

on this point mandates that this Court reexamine the analysis contained in that decision. Upon such a reexamination the fundamental distinctions between the Maine and New York statutes will become evident.

The Winship *and* Mullaney *Decisions*

In *In Re Winship supra* at 364, this Court declared that in a criminal prosecution, due process requires proof of guilt beyond a reasonable doubt "of every fact necessary to constitute the crime with which [the defendant] is charged." This constitutional principle was then made applicable to juvenile delinquency adjudicatory proceedings. In *Mullaney v. Wilbur, supra*, this Court held that a Maine statute requiring a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter violated the due process requirement as defined in *Winship*.

The *Mullaney* decision has sparked a wealth of litigation in the federal and state courts on questions involving burdens of proof and affirmative defenses. Numerous law review articles have appeared attempting to explain the meaning and scope of the *Mullaney* decision.* The confusion and controversies engendered by the *Mullaney* decision is widespread.

*See, e.g., Constitutionality of Affirmative Defenses in the Texas Penal Code, 28 Baylor L Rev. 120-37 (Winter 1976); Affirmative Defenses in Ohio after *Mullaney v. Wilbur*, 36 Ohio SLJ 828-51 (1975); Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on A Criminal Defendant, 64 Geo. L. J. 871-94 (March 1976); New York Penal Law's Affirmative Defenses after *Mullaney v. Wilbur*, 27 Syracuse L. Rev 834-68 (Spring 1976); Unburdening the Criminal Defendant: *Mullaney v. Wilbur* and the Reasonable Doubt Standard, 11 Harv. Civil Rights L. Rev. 390-431 (Spring 1976); Allen, *Mullaney v. Wilbur*, The Supreme Court and the Substantive Criminal Law — An Examination of the Limits of Legitimate Intervention, 55 Texas L. Rev. (No. 2, 1977) (page proofs graciously furnished prior to publication.)

In *State v. Evans*, 362 A.2d 629 (Md. 1976), the Court read *Mullaney* and *Winship* as deciding that "due process of law is *offended* by placing the burden on the defendant to prove, by any standard, *the existence of mitigating circumstances* necessary to lower a felonious homicide to the level of manslaughter" (emphasis added). The New York Court of Appeals in the instant case read *Mullaney* to "*permit* the defendant to establish *the existence of mitigating circumstances*, collateral to the principal facts at issue. . . ." (emphasis added).

Appellant here asserts that "the Maine law accepted by this Court treated malice aforethought as a policy presumption, connoting no substantive fact required to be proved." Appellant's Brief, page 22. A contrary analysis was employed by the Third Circuit in *United States ex rel. Castro v. Regan*, 525 F.2d 1157 (3d Cir. 1975), *cert. denied*, ——U.S.——, 19 CrL 4067 (1976). There, the court denied habeas corpus relief to the petitioner who claimed he had been denied due process in murder prosecution by a jury instruction that, "The law presumes that all unlawful homicides, that is all unlawful killings, are committed with malice unless the lack of malice is affirmatively demonstrated by the evidence." The Third Circuit distinguished *Mullaney* on the ground that malice was an element of intent, which in New Jersey, unlike in Maine, had to be proven beyond a reasonable doubt by the prosecution and could not be presumed absent proof to the contrary.

Other affirmative defenses have been encompassed by the controversy surrounding *Mullaney: insanity*, see *Rivera v. Delaware*, ——U.S.——, 20 CrL 4030 (1976); *Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976); *Grace v. Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975); *State v. Berry*, La., 324 So.2d 822 (1975); *State v. Melvin*, Me., 341 A.2d 376 (1975); Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases, 56 B.U.L. Rev. 499 (1976); *inoperable gun during robbery*, see *Reidout v. Hen-*

derson, ——F.Supp.——, slip opinion, October 13, 1976 (S.D.N.Y.) and *Farrell v. Czarnetsky*, 417 F.Supp. 987, (S.D.N.Y. 1976); *People v. Smith*, 380 N.Y.S.2d 569 (N.Y. Co. 1976); *People v. White*, 383 N.Y.S.2d 800 (N.Y. Co. 1976); *entrapment, People v. Hawkins*, 84 Misc.2d 201 (S. Ct. Kings Co. 1975); *felony murder, Robinson v. Warden*, 419 F. Supp. 1 (E.D.N.Y. March 10, 1976), *aff'd*, ——F.2d—— (2d Cir. June 10, 1976); *Westberry v. Mullaney*, 406 F. Supp. 407 (D.C. Maine 1976); *self defense, State v. Bolton*, S.C., 223 S.E.2d 863 (1976); *State v. Shores*, 28 N.C. App. 323, 221 S.E.2d 79 (1976); *abandonment of attempt to commit crime, Cowart v. State*, 136 Ga. App. 528, 221 S.E.2d 649 (1975). A review of these cases and articles clearly establishes the need for this Court to reexamine the analysis employed in the *Mullaney* decision.

Respondent urges this Court to hold in the instant case that the decision in *Mullaney* applied only to the Maine statute and the unique defect contained therein and that affirmative defenses, in general, are not prohibited by the Constitution. Absent such a declaration there will undoubtedly be endless litigation concerning the constitutionality of scores of affirmative defenses promulgated by many states (see, e.g. Table of New York's Affirmative Defenses appended to this brief).

The Defect in the Maine Statute

An analysis of the statutory scheme invalidated in *Mullaney* clearly establishes that the State did not have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder. Under the Maine statute, the prosecution need only have proved the requisite intent for *manslaughter* to achieve a conviction for murder. This was so because:

(1) Murder and manslaughter were not distinct crimes "but different degrees of the single generic offense of felonious homicide." *State* v. *Wilbur*, 278 A.2d 139 (1971);

(2) Malice aforethought signified a substantive element of intent;

(3) Malice "would be implied unless the defendant proved that he acted in the heat of passion." *Mullaney supra* at 686, 95 S.Ct. at 1883, n.4; and

(4) The burden was on the defendant to negate malice aforethought by proving that he acted in the heat of passion by a preponderance of the evidence.

Thus, under its own interpretation of state law, Maine required "proof of the same element of intent for both murder and manslaughter . . . ." *Id.* at 689, 95 S.Ct. at 1885, n.9. Where the State proved that the defendant had committed a homicide *whether or not he acted with malice aforethought*, the defendant stood convicted of murder unless *he* proved the absence of malice aforethought. The burden of proof upon the prosecution, therefore, was no greater to prove murder than to prove manslaughter. Having established sufficient proof of an intent to commit the crime of *manslaughter*, the State would gain a conviction for the crime of *murder*, unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation.

The effect of the Maine statute was thus to relieve the prosecution of the burden of proof beyond a reasonable doubt of the crime of murder. This shifting of the burden on a critical issue of guilt versus innocence was precisely what the *Winship* decision was intended to prevent:

> Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth(y),. . .

> they are subject to substantially less severe penalties. By drawing this distinction, while *refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns*, Maine denigrates the interests found critical in *Winship*.
>
> *Id.* at 698, 95 S.Ct. at 1889 (emphasis added).

It is significant to note, moreover, that Maine in effect conceded that it had no greater burden to prove murder than manslaughter when it argued that "the fact in question here does not come into play until the jury already has determined that the defendant is guilty and may be punished at least for *manslaughter.*" *Id.* at 697, 95 S.Ct. at 1888-89 (emphasis added).

Thus, Maine subjected a defendant in a homicide case to a greater penalty for murder upon proof beyond a reasonable doubt of the lesser offense of manslaughter. This, respondent respectfully submits, was the defect in the Maine statute which prompted this Court to declare it unconstitutional.

The Defect in the Maine Statute Is Not Present in New York's Homicide Statute

The New York homicide statute differs materially from the Maine statute invalidated in *Mullaney*. Under New York's law:

(1) Murder and manslaughter are separate and distinct offenses;

(2) Malice aforethought is not an element of intent;

(3) A defendant in a homicide case cannot be convicted of murder unless the prosecution has proved an intent to cause death; and,

(4) Neither malice nor intent to cause death is implied in the absence of proof to the contrary by the defendant.

The fundamental differences between the Maine and New York statutes are most dramatically illustrated by the differing

jury instructions in the *Mullaney* and *Patterson* cases. In *Mullaney*, the trial court charged the jury that (a) malice aforethought was an essential and indispensable element of the crime of murder without which the homicide would be manslaughter; (b) malice aforethought was to be conclusively implied from an intentional and unlawful homicide unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation; and, (c) malice aforethought and heat of passion were two inconsistent things and by proving the latter the defendant would negate the former. See *Mullaney supra* at 686-87, 95 S.Ct. at 1883-84.

In the instant case, the trial court charged the jury that (a) murder is an intent crime and the prosecution must prove beyond a reasonable doubt that the defendant intended to kill the victim or some other human being; (b) to find intent, the jury had to find that the defendant had the conscious objective to cause death and that his acts resulted from that conscious objective; (c) whatever proof the defendant may have offered to convince the jury of his innocence, he was not obliged to prove anything; and, (d) the burden was on the defendant to estab. h by a preponderance of the evidence, that his "apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance" (A46-A94).

These differing jury instructions demonstrate the significantly lesser burden of proof upon the prosecution to prove the crime of murder under the previous Maine statute than under the present New York statute. In New York the burden of proof is at all times on the prosecution to prove the element of intent, whereas the Maine statute required the defendant to disprove this crucial element of the crime.

The critical difference between the statutes of the two states may be illustrated by applying each of them to the same

hypothetical case. Under the following set of hypothetical facts, a defendant would have been convicted of murder in Maine whereas in New York, these facts would only support a conviction for manslaughter:

(1) V, victim, is dead;

(2) The cause of death was a bullet in V's head;

(3) D, defendant, intentionally fired the gun which caused the bullet to lodge in V's head.

Under these facts, the prosecution in Maine would have satisfied its burden to convict the defendant of murder. Malice aforethought would have been implied from these facts and *unless* the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, he would be guilty of murder.

In New York these facts, *standing alone*, would not be sufficient to support a conviction for murder, since they do not evidence the requisite element of intent to cause death. The prosecution would be required to evince further facts concerning the circumstances of the death (e.g. proximity of V and D at the time of the shooting, D's expertise in handling a gun, D's knowledge that the gun was loaded, etc.) to sustain a conviction for murder.

Hence, in New York a defendant cannot be convicted of the crime of murder absent proof beyond a reasonable doubt of every element of the crime of murder. In Maine, the affirmative defense of heat of passion on sudden provocation reduced the burden of proof upon the prosecution, whereas in New York the burden of proof remains with the prosecution on all elements of the crime of murder. The New York statute thereby satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged.

No Significant Difference Regarding Burden of Proof Exists between New York's Affirmative Defense of Extreme Emotional Disturbance and the Affirmative Defense of Insanity Upheld by this Court.

In *Leland* v. *Oregon*, 343 U.S. 790 (1952), this Court upheld the constitutionality of a state statute requiring a defendant who pled insanity to establish that defense beyond a reasonable doubt. In *Mullaney*, Mr. Justice Rehnquist, joined by The Chief Justice, reaffirmed the validity of the *Leland* decision. Recently, this Court upheld a Delaware statute in *Rivera* v. *Delaware supra* requiring a defendant raising an insanity defense to prove mental illness or defect by a preponderance of the evidence.

It seems clear, therefore, that a state may constitutionally require the defendant to bear the burden of proving the affirmative defense of insanity. Indeed, every state that has recently considered the question has so held. *State* v. *Pendry*, 227 SE2d 210 (W. Va. Ct. App. 1976); *Breland* v. *State*, 489 SW2d 623, *cert. denied*, 412 US 939 (Texas Ct. of Crim. App. 1972); *State* v. *Berry*, La. 324 So.2d 822 (1975); *Grace* v. *Hopper*, 234 Ga. 669, 217 SE2d 267 (1975); *State* v. *Melvin*, Me., 341 A.2d 376 (1975); see also *Buzynski* v. *Oliver*, 538 F.2d 6 (1st Cir. 1976).

Appellant seeks to escape the weight of this authority by arguing that there are significant differences between the defense of insanity and the defense of extreme emotional disturbance. Respondent submits, however, that whatever differences exist between the two defenses detract from, rather than aid, appellant's constitutional attack.

The defense of insanity clearly relates to the issue of the defendant's guilt or innocence. If the defense succeeds, the defendant will be exculpated from the crime charged. The defense of extreme emotional disturbance has no such impact. Successful use of this defense results only in mitigation of the

offense and reduction in exposure to punishment. Inasmuch as the very guilt or innocence of the defendant is at stake where insanity is pleaded, but such is not the case where the defense is extreme emotional disturbance, surely the defendant having to prove insanity bears a heavier burden. Indeed, a defendant who successfully interposes a defense of insanity, unlike the defendant who succeeds in pleading extreme emotional disturbance, "is free of the stigma of being a criminal and will not be criminally confined." *Buzynski* v. *Oliver supra* at 8.

To the extent that each defense imposes a hardship upon the prosecution to negate, the greater hardship exists in negating the defense of extreme emotional disturbance. It is extremely unlikely that a persuasive case can be made out for insanity on lay testimony alone. See LaFave and Scott, Criminal Law §40, p. 314 (1972). Lay testimony can, however, be persuasive in establishing the defense of extreme emotional disturbance, since the ultimate issue is "whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence." Model Penal Code §201.3, Comment (Tent. Draft No. 9, 1959). Indeed, the sympathy — arousal aspect of the defense of extreme emotional disturbance, in addition to the fact that it only results in mitigation of the offense, surely makes it more difficult to refute before a jury than does a defense which exculpates the defendant.

Appellant's argument that the "state practices do not support shifting the burden on extreme emotional disturbance" is also ill founded. While plainly worth considering, "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . ." *Leland* v. *Oregon supra* at 798. It is significant to note, moreover, that in *Leland* this Court upheld a statute that was unique.

Respondent respectfully submits, therefore, that inasmuch as "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity . . ." (A111), and this affirmative defense is only a mitigating circumstance and not exculpatory, as is the defense of insanity, this New York statute should pass constitutional muster as readily, if not more so, than the statutes upheld in the above-cited cases.

POINT II

Should this Court wish to reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent urges that *Mullaney* not be given retroactive effect.

Inasmuch as the defendant's conviction predated the *Mullaney* decision, retroactive application of that decision is required before he may derive any benefit therefrom. Although this Court has not yet determined to apply *Mullaney* retroactively, the New York Court of Appeals interpreted the *Mullaney* decision so as to require retroactive application. Since, however, the court ultimately determined that New York's affirmative defense of extreme emotional disturbance does not violate due process, the retroactivity issue is moot in this appeal.

This Court has noted probable jurisdiction in *Hankerson v. North Carolina* (No. 75-6568), where the issue of retroactive application of *Mullaney v. Wilbur* is squarely presented. The arguments against applying *Mullaney v. Wilbur* retroactively or giving limited retroactive application are outlined in the respondent's brief filed in *Hankerson*. Should this Court wish to reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent argues that *Mullaney* not be given retroactive effect.

CONCLUSION

In conclusion, respondent contends that the New York affirmative defense of extreme emotional disturbance comports with basic concepts of due process. Under this Court's decisions in *Winship* and *Mullaney*, due process requires the State to bear the burden of proof beyond a reasonable doubt "of every fact necessary to constitute the crime with which [the defendant] is charged." This due process standard does not prohibit the placing of the burden of proof upon the defendant to establish an affirmative defense in mitigation of the most serious crime charged, where the prosecution has established all of the elements of that crime beyond a reasonable doubt. The Maine statute invalidated in *Mullaney* did not satisfy this standard, because the prosecution did not have the burden of proving intent to cause death beyond a reasonable doubt. The New York statute challenged in the instant case does not contain this defect and, in fact, places a lesser burden on the defendant than do statutes, upheld by this Court, which require a defendant to prove the defense of insanity.

For the above-stated reasons, it is respectfully submitted that the decision of the New York Court of Appeals upholding the constitutionality of New York's affirmative defense of extreme emotional disturbance should be affirmed.

Dated: Bath, New York
December, 1976

Respectfully submitted,

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APPENDIX

TABLE OF NEW YORK'S AFFIRMATIVE DEFENSES

Penal Law Section	Crime	Substance of Affirmative Defense
40.00(1)	any offense	Defendant coerced by the use or threatened imminent use of unlawful physical force on defendant or a third person which a person of reasonable firmness would be unable to resist.
40.05	any offense	Entrapment — Defendant induced or encouraged to engage in proscribed conduct by public servant or one cooperating with public servant seeking to obtain evidence for prosecution and methods used created a substantial risk that offense would be committed by one not otherwise disposed to commit it.
40.10(1)	any offense other than attempt where guilt depends on liability for acts of another	Renunciation — Under circumstances manifesting a voluntary and complete renunciation, defendant withdrew prior to commission of offense and made a substantial effort to prevent it.
40.10(2)	criminal facilitation	Prior to commission of offense which defendant facilitated, substantial effort was made by defendant to prevent the felony.

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Penal Law Section	Crime	Substance of Affirmative Defense
40.10(3)	attempt	Voluntary with a complete renunciation of criminal purpose, defendant avoided commission of crime by abandoning effort and if necessary took other affirmative steps to prevent it.
40.10(4)	criminal solicitation	Where crime not committed voluntarily and complete renunciation of purpose and defendant prevented the crime.
125.25(1)	Murder second degree	Extreme emotional disturbance with reasonable explanation determined by viewpoint of person in defendant's situation with this knowledge or defendant's conduct was to aid without duress another's suicide.
125.25(3)	Murder second degree	Defendant did not commit, aid or request act, was not armed with a deadly weapon capable of causing serious injury or death, had no reasonable ground to believe others had such a weapon and intended to act in a manner likely to result in death or serious physical injury.
130.10	Sexual offenses where lack of consent is based on incapacity	Defendant had no knowledge of facts or conditions responsible for incapacity at time of offense.

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Penal Law Section	Crime	Substance of Affirmative Defense
135.75	Coercion by instilling in victim fear of prosecution	Defendant reasonably believed the charge to be true and his sole purpose was to induce victim to make good the wrong.
150.05(2)	Arson in the fourth degree	Only defendant had a possessory or a proprietary interest in the building.
150.05(2)	Arson in the third degree	Only defendant had a proprietary interest in the building or others with an interest consented, sole intent was to destroy for lawful purpose, no reasonable ground to believe conduct would endanger life, safety or damage another building.
155.15(1)	Larceny by trespass or embezzlement	Appropriated under claim of right made in good faith.
155.15(2)	Larceny by instilling in victim fear of prosecution	Defendant reasonably believed the charges to be true and sole purpose was to induce victim to make good the wrong.
160.15	Robbery first degree	Weapon not loaded or incapable of firing a shot causing injury or death.

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Penal Law Section	Crime	Substance of Affirmative Defense
190.15	Issuing a bad check	Defendant or another in his behalf made full satisfaction within ten days after dishonor or defendant acted as employee executing orders of superior authorized to direct his activities.
190.20	False advertising	False statement was not knowingly or recklessly made.
210.25	Perjury	Defendant retracted false statement during proceeding in which it was made before it substantially affected the proceeding and before its falsity was or would be exposed.
215.45(2)	Compounding a crime	Benefit did not exceed amount defendant reasonably believed due as restitution for harm caused by the crime.
215.59	Bail-jumping and failing to respond to appearance ticket	Defendant's failure to appear was unavoidable and due to circumstances beyond his control and during the time between expiration of thirty day period and commencement of action defendant appeared voluntarily or was unable as a result of circumstances beyond his control.

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Penal Law Section	Crime	Substance of Affirmative Defense
235.15	Obscenity	Audience consisted of persons having scientific, educational, governmental or similar justification for viewing or possessing.
260.15	Endangering the welfare of a child by failure to provide medical care	Defendant is parent or guardian, is a member of organized group that proscribes prayer as principal treatment of illness and child treated in accord with that belief.